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No. 10-1014

Supreme Court, U.S.
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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II, in his
Official Capacity as Attorney General of Virginia,

Petitioner,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of Health and
Human Services, in her Official Capacity,

Respondent.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

INTRODUCTION

Because of the significant constitutional issues raised and the crippling uncertainty faced by the country until those issues are resolved, Virginia seeks, pursuant to Rule 11 of the Rules of this Court, to expedite resolution of its challenge to the Patient Protection and Affordable Care Act ("PPACA"). The Secretary's opposition to Virginia's Petition is largely based on a misapprehension of the scope of the Virginia Health Care Freedom Act, Va. Code § 38.2-3430.1:1, and on a failure to recognize the significant damage that delaying final resolution of the questions will inflict upon States and others.

Contrary to the Secretary's argument, it is not true that "[t]he Virginia General Assembly enacted a statute declaring that its residents do not have to comply with a provision of" PPACA. (Br. in Opp'n. at 2). The Virginia enactment was passed at a time when no one could say whether a federal health care law would pass both houses of Congress. The Virginia Health Care Freedom Act exercises Virginia's reserved police powers to provide that no citizen of Virginia is required to purchase a policy of health insurance. Although the law contains a few narrow exceptions, it is a statute of general application, covering other entities such as employers and local governments. It is well established in this Court and in the circuit courts of appeals that the United States and the States have sovereign standing to defend

their laws. Unsurprisingly, therefore, the district court found that Virginia had standing to seek and obtain a declaration that Congress exceeded its enumerated powers in enacting PPACA. (App. at 50).

Since the filing of the Petition, the governors of Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming have written to the President, reporting that every state faces significant challenges and expenses in implementing PPACA over the next several years and requesting his agreement to expedited review. http://www.governor.virginia.gov/News/docs/Governors%20Lawsuit%20Letter.pdf. In particular, these 28 governors addressed the overhang of uncertainty:

> Given the daunting and costly financial and regulatory burdens that our states and the private sector will face in implementing PPACA over the coming years, particularly during this unprecedented budgetary time, public interest requires expediting a final resolution of the litigation to give certainty as soon as possible. We should not endure years of litigation in the circuit courts, when the Supreme Court can promptly provide finality. This resolution can help prevent the states and the private sector from undertaking potentially unnecessary measures and expenses. More importantly,

> our businesses, health care providers, and citizens of our great nation need to know as soon as possible whether all or part of the law will be upheld or stricken, so they know their options and obligations.

ARGUMENT

Rule 11 of the Rules of this Court provides that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The Secretary concedes that "[t]he constitutionality of the minimum coverage provision is undoubtedly an issue of great public importance." (Br. in Opp'n at 12). But she questions whether this is "one of the rare cases that justifies 'deviation from normal appellate practice' and 'require[s] immediate determination in this Court.'" (*Id.*)

If this case does not satisfy that standard, it is difficult to see what case ever could. The issue is a pure question of law. Every district court that has reached the merits has rejected or declined to rule on the Secretary's taxing power argument while concluding that the claimed power under the Commerce Clause is novel or unprecedented. *Mead v. Holder*, No. 10-950 (GK), 2011 U.S. Dist., LEXIS 18592, at *55, *70-71 (D.D.C. Feb. 22, 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788

(E.D. Va. 2010) (App. 29, 44-46); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 893, 895 (E.D. Mich. 2010); *Florida v. United States Department of Health & Human Services*, 716 F. Supp. 2d 1120, 1143-44, 1163 (N.D. Fla. 2010); *Liberty University, Inc. v. Geithner*, No. 6:10-cv-00015-nkm, 2010 U.S. Dist., LEXIS 125922 *30-*37, *48-*49 (W.D. Va. Nov. 30, 2010). Because PPACA cannot be upheld unless the cases of this Court marking the affirmative and negative outer limits of the Commerce Clause are extended, only this Court can definitively resolve that question. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

As a matter of timing, the Secretary argues that at least one of the cases pending in the circuit courts of appeals will possibly reach this Court next term in the ordinary course. (Br. in Opp'n at 14). But this overlooks the desirability of using Rule 11 as it was used in *Gratz v. Bollinger*, 539 U.S. 244 (2003), to ensure that a significant constitutional issue is heard on the broadest available record.

The Secretary professes to see no evidence of how Virginia is being burdened because it has not yet spent new, appropriated state funds. (Br. in Opp'n at 15-16). This, of course, is inconsistent with the Secretary's position in the Northern District of Florida where she sought clarification from the district court based upon "'the variety of statutory provisions that would be subject to disruption if . . . the declaratory judgment was anticipated to operate as an immediate injunction with respect to the

programs currently in effect.'" Defs' Mot. to Clarify at 9-13, *Florida*, 716 F. Supp. 2d 1120 (No. 3:10-cv-00091), Doc. 156. A significant number of the examples given in her motion by the Secretary involved states. *Id.* (*See also* Amicus Br. of Ass'n of American Physicians & Surgeons at 4). Furthermore, the entire nation is and will continue to be affected by uncertainty. That some private actors are suffering immediate harm has been conceded by the Secretary through her abandonment of standing challenges to individual plaintiffs in pending appeals. Mot. to Clarify, *supra*, at 14-15. (*See also* Amicus Br. of Physician Hospitals of America at 2-3).

The paradigm for a Rule 11 grant involves a constitutional challenge to federal action joined with national economic impact. PPACA is frequently described as an undertaking to regulate one-sixth of the American economy. The Secretary's argument, that constitutional challenges to such a sweeping legislative reordering of American life, is not of comparable importance to the industries, economic impact, and employment affects in *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Bd. v. Alton Railroad Co.*, 295 U.S. 330 (1935), is extravagant. The national impact of resolving PPACA piecemeal over a period of years dwarfs the impact threatened by the potential delay in *Mistretta v. United States*, 488 U.S. 361 (1989).

The Secretary's argument that this case does not present a good vehicle for resolving the constitutionality of PPACA on the merits because of questions about Virginia's standing begins with a strawman. Virginia, throughout this case, has renounced any reliance on proprietary, *parens patriae* or any other form of quasi-sovereign standing. (App. at 58-60); Pl.'s Mem. in Opp'n to Mot. to Dismiss at 22-28, *Sebelius*, 728 F. Supp. 2d 768 (No. 3:10-cv-00188), Doc. 28. This makes the Secretary's discussion of these matters quite beside the point. (Br. in Opp'n at 19-22).

The Secretary's standing argument also depends upon a misconstruction of the scope, reach and effect of the Virginia statute. The statement that "the statute exempts entities other than the federal government" (Br. in Opp'n at 20) is narrowly and literally true in the sense that there are a few exceptions. But it is clearly a statute of general application applying broadly to employers and local governments as Virginia argued in the district court. (Tr. of July 1, 2010 at 47-53, *Sebelius*, Doc. 81). This renders the statement that "petitioner has not suggested that the statute serves any other function other than as an effort to create standing" (Br. in Opp'n at 20) not merely unsupported by the record but contrary to it. Nor does it matter that the Virginia law has no separate enforcement mechanism. That is true of Federal statutes as well. *See e.g.*, 1 U.S.C. § 7; 8 U.S.C. § 1623; 28 U.S.C. § 1738C. And nothing would prevent the Attorney

General from enforcing the law against a locality. Furthermore, any citizen would have a private cause of action if discharged from employment contrary to its terms. *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709 (Va. 2002).

Only on the next to last page of her brief does the Secretary even discuss the true doctrinal basis for Virginia's standing: sovereign standing based upon the sovereign injury of having to give way with respect to its code of laws if the federal law is valid. (Br. in Opp'n at 21). There the Secretary concedes: "A State likewise may challenge a measure that commands the State itself to take action, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992) (federal law required state to take title to nuclear waste or enact federally approved regulations), or that prohibits specified state action, *e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (federal law prohibited States from using literacy tests or durational residency requirements in elections)."

The *ipse dixit* assertion that this case "has none of those features" is simply incorrect. As demonstrated in the Petition, the sovereign standing of a state to defend its code of laws is well established in this Court and in the federal circuits. (Pet. at 7-8). Sovereign standing has also been successfully claimed by the federal government. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that the complainant asserts an injury to the United States – both the injury to its

sovereignty arising from the violation of its laws . . . and the proprietary injury. . . ."); *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1324-25 (Fed. Cir. 2010) (sovereign injury "is a sufficient injury in fact"). If sovereign standing runs in favor of the United States, there is no principled reason why it does not run in favor of the joint sovereign, Virginia. Accordingly, Virginia has standing, and the Secretary's argument that Certiorari should be denied on that basis fails.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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